

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,947

WARREN G. ROBINSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

DAVID G. BRESS,
United States Attorney.

FILED SEP 19 1968

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Special Assistant
to the United States Attorney.

Cr. No. 1486-67

ISSUE PRESENTED *

Whether the trial court committed reversible error in exercising its discretion, after conducting a *Gordon* hearing, to admit two of appellant's many prior convictions for the purpose of impeaching appellant's credibility?

* This case has not previously been before this Court under the same or similar title.

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,947

WARREN G. ROBINSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed November 27, 1967, appellant was charged with housebreaking (22 D.C. Code § 1801) and petit larceny (22 D.C. Code § 2202) arising out of breaking into a shop and stealing some money. Trial was held on March 1 and 4, 1968 before Judge Sirica and a jury, and on March 5, 1968, the jury returned a verdict of guilty on the housebreaking charge and not guilty as to petit larceny. (Tr. 102-103.) Appellant was sentenced to imprisonment for a term of eighteen months to seven years.

The Trial

The Government's case consisted of the testimony of the complaining witness and two police officers.

The complaining witness, Mr. Robert C. Wear, the owner of Beacon Dry Cleaning, 1801 Calvert Street, N.W., Washington, D. C., testified that on October 14, 1967, at about 6:00 p.m. he closed and locked his store, leaving about twenty-five dollars in dollar bills in one of his two cash registers (Tr. 4-5). He stated that he received a telephone call late in the evening of October 15, 1967, and that when he arrived at the store at about 1:00 a.m. on the morning of October 16, he observed that a window on the Calvert Street side of the store was broken, that one of the cash registers was broken and that about \$25 was missing (Tr. 5-6).

The two police officers, Officer Richard D. Clark and Officer John P. Geibig, testified that at about 10:55 p.m. on October 15, 1967, they had responded to a radio run for a housebreaking in progress at Beacon Dry Cleaning (Tr. 13, 40). Officer Clark testified that when he arrived at the store, he heard a noise and saw someone attempting to crawl from a broken window (Tr. 14). Clark stated that as he saw the person coming out, he drew his service revolver, approached the window and advised the person to come completely out and to keep his hands visible (Tr. 15). Both officers testified that a screwdriver was removed from the subject's pocket (Tr. 16, 41) and both identified appellant as the man they had seen climbing from the window of the cleaning establishment (Tr. 16-17, 41-42).

After the close of the Government's case, counsel approached the bench (Tr. 45) and defense counsel stated that he wanted the appellant to testify and wished to raise the question about the prior criminal record (Tr. 46). Appellant's substantial conviction record was shown to the judge (Tr. 47), and the Government attorney stated that while there were several unlawful entry, housebreaking and petit larceny convictions prior to 1960, he felt that the court in its discretion would perhaps overrule their use and that the Government would ask to use only two

more recent convictions, petit larceny in 1961 and unlawful entry in 1965 to impeach the defendant (Tr. 47). The judge stated that the *Gordon* case indicated that the court should hold a hearing out of the presence of the jury and then after having heard the defendant's testimony he would be better able to rule upon the use of prior convictions (Tr. 48).

At the hearing, appellant testified in essence that he was never in the cleaners (Tr. 50), that the police arrested him as he was walking up the street (Tr. 51) and that he had no screwdriver (Tr. 53). At the conclusion of appellant's testimony, the court stated:

I am acquainted with the Luck case, of course, and the recent Gordon case, taking into consideration guidelines set by the Court of Appeals. I think the government should be permitted to ask about the convictions subsequent to 1960. They can go back much beyond that. *In this case I am going to rule I think it is perfectly proper only for the purpose of effecting his credibility as a witness, if it does, that the government may show those two convictions—similar offenses, unlawful entry, similar to housebreaking, except it is a lesser offense and petty larceny.*

MR. ALLEN: Your Honor, I suppose—

THE COURT: Frankly he has such a fantastic story here. I mean if I were the judge and jury in this case I wouldn't hesitate to find beyond a reasonable doubt if I were judge and jury, which I am not, that this defendant was the man who was coming out of those permises. Not only does he make the police officer out as a liar he said he didn't even have the screwdriver.

Now he is lucky he is not being tried before me without a jury. I think he is lying. *I think the jury out [ought] to know something about his credibility.* I made my ruling. All right.

If there is a conviction in this case then you take the case to the Court of Appeals and let the Court of Appeals decide the matter. *I think this is the type of case where the Court should exercise its discretion*

in favor of permitting the Government to cross examine the witness on prior convictions. (Tr. 54-55.)

In his testimony before the jury appellant repeated the substance of his testimony at the hearing (Tr. 57-72). When defense counsel elicited the prior convictions, the judge instructed the jury that the evidence of prior convictions is to be considered only as to appellant's credibility as a witness and only "in connection with your evaluation of the credence or the weight to be given to his present testimony in court," and that no inference of guilt should be drawn (Tr. 58). In the charge to the jury the judge repeated in more detail that the prior convictions should only be considered in evaluating the credibility of appellant's testimony and that no inference of guilt might be drawn (Tr. 84-85).

STATUTE INVOLVED

Title 14 District of Columbia Code Section 305 (1967) provides:

A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers as to such matters.

ARGUMENT

Appellant's impeachment was properly permitted.

(Tr. 58)

The District Court, properly attuned to his discretionary authority and duties under *Gordon v. United States*, 127 U.S. App. D.C. 343, 383 F.2d 936 (1967) heard, out of the presence of the jury, the appellant's proposed defense testimony. That testimony challenged the veracity of the

police officers in regard to the apprehending of appellant emerging from the broken window of the cleaners with a screw driver and some one dollar bills in his pocket. Appellant's version was simply that he was arrested while innocently walking the street and that he possessed no screwdriver.

The basis for the District Court's decision to permit impeachment is contained in the court's statement, "I think the jury out (sic) [ought] to know something about his credibility." The question for review is whether the judge's decision, based upon this rationale, is so arbitrary as to require reversal. We submit that it could not be gainsaid that the decision, far from approaching arbitrariness, tended to insure a fair and reliable verdict. In any event, since *Luck v. United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965), makes impeachment by prior conviction a matter of discretion to be exercised by the trial court, we view this Court's role as one of reviewing to ascertain the existence of a rational basis for the permitted impeachment and not a *de novo* determination independent of the perspective always available to a trial judge and never to the appellant tribunal. Here the witness-defendant who, according to the police responding to a reported burglary, was apprehended emerging from the broken window, squarely challenges the truthfulness of the officers' testimony by asserting his innocent presence walking in the vicinity and arbitrary arrest by the officers. We can envision no better situation where light should be shed upon the veracity of such a claim by relatively recent convictions clearly involving dishonesty.¹ In passing, we note that appellant's efforts in carrying his burden of persuasion regarding prejudicial impact versus probative relevance to credibility fell far short of demonstrating that the former out-weighed the latter.

As a proper insurance against a "bad man" inference by the jury, the trial judge's immediate and detailed in-

¹ It should also be borne in mind that the prosecution, anticipating possible improper impeachment, declined to use many pre-1961 convictions.

struction (Tr. 58) limited the fact of convictions "only as to [appellant's] credibility as a witness." (See also Tr. 84). Moreover, it is noted that appellant's counsel had no complaint about the instruction. (Tr. 58.) The trial judge after hearing appellant's testimony out of the presence of the jury weighed the various factors and made the determination that the jury should know something about appellant's credibility and that this was the type case where the court should exercise its discretion in favor of permitting the Government to impeach by using two prior convictions. The record clearly demonstrates that this was not an abuse of discretion.²

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
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to the United States Attorney.*

² With due respect for appellant's counsel's efforts in contending that this Court's interpretation of 14 D.C. Code § 305 impairs the exercise of a criminal defendant's alleged Sixth Amendment right to testify in his own behalf, Brief For Appellant, p. 12-25, the United States considers such argument wholly without merit. The United States urges the Court to decline to consider the argument as moot on the basis of *Trimble v. United States*, 125 U.S. App. D.C. 173, 369 F.2d 950 (1966). Additionally, no claim based upon alleged unconstitutionality was raised below and it should not be permitted to be raised for the first time here on appeal.

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
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473

No. 21,947

United States Court of Appeals
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FILED AUG 8 1968

Nathan J. Paulson
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WARREN G. ROBINSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from a Judgment of
Conviction in the United States
District Court for the District of Columbia

HUGH LATIMER

888 17th Street, N. W.
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(Appointed by this Court)

(i)

STATEMENT OF QUESTIONS PRESENTED

1. Should a conviction be reversed when the trial court, in permitting the admission in evidence of prior convictions for similar conduct, failed to apply the standards set forth by the Court in the Luck and Gordon cases for determining such admission?

2. Does the admission in evidence of appellant's prior convictions, pursuant to §14-305, D.C. Code, violate appellant's Sixth Amendment right to testify in his own behalf?

(ii)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21947

WARREN G. ROBINSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from a Judgment of
Conviction in the United States
District Court for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction for housebreaking entered by the United States District Court for the District of Columbia on April 19, 1968, pursuant to a jury verdict of guilty rendered on March 5, 1968. Appellant was sentenced to imprisonment for a term of eighteen months to seven years. His application for leave to appeal without pre-

payment of costs was granted by the district court on April 19, 1968. Jurisdiction to decide this appeal is vested in this Court by virtue of Title 28, U.S.C. §§ 1291, 1294 and 1915.

STATEMENT OF THE CASE

Returned and filed in open court on November 27, 1967, the indictment charged that on or about October 15, 1967, appellant entered the shop of Robert C. Wear with intent to steal property of another (housebreaking, 22 D.C. Code §1801), and on or about October 15, 1967, that appellant stole property of Robert C. Wear of the value of about twenty-five dollars (petit larceny, 22 D.C. Code §2202). Trial was held on March 1 and 4, 1968, before Judge Sirica and a jury, and on March 5, 1968, the jury returned a verdict of guilty with respect to housebreaking and not guilty as to the petit larceny charge (Tr. 102-103).

The complaining witness, Robert C. Wear, the owner of Beacon Dry Cleaning, 1801 Calvert Street, N. W., Washington, D.C., testified that at approximately 6:00 P.M. on October 14, 1967, he closed and locked his shop, leaving about twenty-five dollars in dollar bills in one of the two cash registers (Tr. 4-5). He stated that he received a call late in the evening of October 15, 1967, and that when he arrived at his store at approximately 1:00 A.M. the morning of October 16, he observed that a window on the Calvert Street side of his establishment was broken, that one of the cash registers was broken and that approximately

twenty-five dollars was missing (Tr. 5-6).

Two police officers, Officer Richard D. Clark and Officer John P. Geibig, were witnesses for the government and testified that they had responded to a radio run for a housebreaking in progress at Beacon Dry Cleaning at approximately 10:55 P.M. on October 15, 1967 (Tr. 13, 40). Officer Clark testified that when he arrived at the cleaning establishment, he saw someone attempting to crawl from a broken window, that he advised the subject to come completely out and placed him under arrest (Tr. 14-16).

Although there was conflict in the officers' testimony as to the lighting conditions (Tr. 15, 24-25, 43) and as to who searched the subject (Tr. 16, 30), both testified that a screwdriver was removed from the subject's pocket (Tr. 16, 41), and both identified appellant as the man they had seen climbing from the window of the cleaning establishment (Tr. 16-17, 41-42). Officer Clark stated that after the subject was searched, he was placed in a patrol wagon and taken to the precinct where he was booked and again searched and four one-dollar bills removed from his belt (Tr. 16).

After the close of the government's case, counsel for appellant below approached the bench and informed the Court that the defendant desired to testify in his own behalf and raised the question of prohibiting the government from impeaching appellant with appellant's prior criminal record (Tr. 46-47). Counsel for the government informed the Court that he wished to

go into two prior convictions of appellant, one for unlawful entry in May 1965 and the other a petit larceny offense in January 1961 (Tr. 47).

The Court, referring to the Gordon case, ^{1/} informed defense counsel that it would hear defendant's testimony out of the presence of the jury and prior to defense counsel's opening statement in order to rule on the use of prior convictions for impeachment purposes (Tr. 48). Appellant Robinson took the stand and denied committing the crimes with which he was charged, stating that he had been walking up Calvert Street on the night in question when he was stopped by Officer Clark and arrested (Tr. 50-51). Appellant also testified that he did not have a screw driver with him at the time and that he had not seen it prior to its introduction into evidence by the government (Tr. 53).

After completion of appellant's testimony out of the presence of the jury and after counsel for appellant below objected that use by the government of the two prior convictions for similar conduct would be prejudicial, the District Judge stated that, in his view, appellant was "lying," that he would not hesitate to find against appellant beyond a reasonable doubt, and that for this reason the jury should know about appellant's

^{1/} Gordon v. United States, 127 U.S. App. D.C. 343, 383 F. 2d 936 (1967).

prior convictions (Tr. 55-56). In so ruling, the Court stated specifically:

"Frankly he has such a fantastic story here. I mean if I were the judge and jury in this case I wouldn't hesitate to find beyond a reasonable doubt, if I were judge and jury which I am not, that this defendant was the man who was coming out of those premises. Not only does he make the police officer out as a liar he said he didn't even have the screwdriver.

"Now he is lucky he is not being tried before me without a jury. I think he is lying. I think the jury [ought] to know something about his credibility. I made my ruling. All right." (Tr. 55).

Appellant's case was then presented to the jury which consisted solely of appellant's testimony. Appellant repeated the substance of the testimony he had given out of the presence of the jury (Tr. 57-72). He was questioned about the two prior convictions for similar conduct, and at that point in the trial, the judge instructed the jury that the evidence of prior convictions was to be considered only as to appellant's credibility as a witness and no inference of guilt should be drawn. (Tr. 58). In the course of the charge to the jury the Court repeated in more detail that appellant's admission that he had been convicted on prior occasions of the crime of unlawful entry and destroying private property and petit larceny had no bearing on the question of his guilt or innocence but that introduction of such evidence was permitted solely to help the jury decide whether to believe appellant's testimony (Tr. 84-85). The jury returned a verdict of guilty as to housebreaking and not guilty with respect to the petit larceny charge (Tr. 102-103).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 14-305, D.C. Code provides:

A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers as to such matters. To prove the conviction of crime the certificate, under seal, of the clerk of the court wherein proceedings containing the conviction were had, stating the fact of the conviction and for what cause, is sufficient. (Dec. 23, 1963, 77 Stat. 519, Pub. L. 88-241, § 1, eff. Jan. 1, 1964.)

STATEMENT OF POINTS

1. A conviction cannot stand where the district court, in permitting the admission in evidence of prior convictions for similar conduct, failed to apply the standards set forth by this Court in the Luck and Gordon cases for determining such admission.

2. The admission in evidence of appellant's prior convictions, pursuant to §14-305, D.C. Code, violated appellant's Sixth Amendment right to testify in his own behalf.

SUMMARY OF ARGUMENT

1. In permitting the admission in evidence of two prior convictions of appellant for conduct substantially the same as that for which he was tried below, the trial court failed to weigh the prejudicial effect of the prior convictions as required by Luck v. United States, 121 U.S. App. D.C. 151, 348 F. 2d 763 (1965), and failed to give "strong reasons for disclosure" as required by Gordon v. United States, 127 U.S. App. D.C. 343, 383 F. 2d 936 (1967), when the use of prior convictions for similar conduct is in issue.

Instead of applying the standards set forth in the Luck and Gordon cases, the trial judge, after hearing appellant's testimony out of the presence of the jury, merely stated that, in his view, appellant was "lying," that he would not hesitate to find against appellant beyond a reasonable doubt if he were sitting as the fact finder, and for this reason ruled that the jury should hear about appellant's prior convictions. The court below thus fell into the error recently warned against by this Court in determining the Luck issue by failing to "insulate [his] discretion from the influence of his own impressions as to the accused's credibility." Williams v. United States, ___ U.S. App. D.C. ___, ___ F. 2d ___ (No. 20,583, decided April 5, 1968) (concurring opinion).

2. In Luck v. United States, supra, and subsequent cases, this Court has interpreted §14-305, D.C. Code to mean that the use of prior convictions for impeachment purposes was not automatic but should be a matter of "sound judicial discretion." As in this case, however, operation of such discretion still permits a trial judge to admit evidence of past crimes, and thus deters a defendant from testifying in his own behalf and subjects him to evidence highly prejudicial on the issue of guilt if he does testify.

A criminal defendant's Sixth Amendment right to offer testimony in his own behalf cannot be made contingent upon the exercise of judicial discretion. Just as a criminal defendant has a constitutional privilege not to testify without any prejudice or penalty attaching to the exercise of such privilege, Griffin v. State of California, 380 U.S. 609 (1965), so he has a constitutional privilege to give testimony in his own behalf without prejudice and without "making its assertion costly." 380 U.S. at 614.

This Court now should enforce judicially what has long been recognized, namely, that the very introduction of evidence of prior convictions prejudices a defendant since juries cannot be expected to limit such evidence to the alleged purpose of gauging a defendant's credibility. In case after case, the Supreme Court has been "going behind the historic assumptions of the law of evidence and considering the psychological reality of the jury's functioning . . ." Awkard v. United States, 122 U.S. App.

D.C. 165, 352 F. 2d 641, 646 (1965); See Ferguson v. State of Georgia, 365 U.S. 570 (1961); Jackson v. Denno, 378 U.S. 368 (1964); Washington v. State of Texas, 388 U.S. 14 (1967); Bruton v. United States, 36 U.S.L.W. 4447 (U.S. May 20, 1968). This Court should do so here.

The attempt to formulate standards and procedures for determining when prior convictions may be used for impeachment purposes has demonstrated that such an attempt is unworkable. A criminal defendant's Sixth Amendment rights can be protected only by prohibiting the use of prior convictions for impeachment purposes, and §14-305, D.C. Code should be declared unconstitutional to the extent that it permits such use.

ARGUMENT

- I. THE DISTRICT COURT ERRED IN FAILING TO APPLY THE STANDARDS SET FORTH IN THE LUCK AND GORDON CASES FOR ADMISSION IN EVIDENCE OF PRIOR CONVICTIONS FOR SIMILAR CONDUCT.

[With respect to Point I, appellant desires the Court to read the following pages of the transcript: 46-58, 84-85.]

"This case presents once again the troublesome problem of introducing evidence of a defendant's prior convictions to impeach his credibility, as authorized by 14 D.C. Code §305." Brown v. United States, 125 U.S. App. D.C. 220, 370 F. 2d 242 (1966). In this case, as in Brown, the trial judge misconstrued his role under Luck v. United States, 121 U.S. App. D.C. 151, 348 F. 2d 763 (1965) in that he failed to take into account the

factors specified by this Court in Luck^{2/} as those to be weighed by a trial judge in determining whether or not the prejudicial effect of impeachment by prior conviction outweighs the probative relevance of the prior convictions to the issue of credibility.

Despite the fact that both of the prior convictions upon which the government intended to rely related to convictions for substantially the same conduct and that appellant was the sole witness to testify in his behalf, the trial judge, after hearing appellant's testimony out of the presence of the jury, merely stated that, in his view, appellant was "lying," that he would not hesitate to find against appellant beyond a reasonable doubt if he were sitting as the fact finder, and for this reason ruled that the jury should hear about appellant's prior conviction.

Even more determinative in the present case is this Court's admonition in Gordon v. United States, 127 U.S. App. D.C. 343, 383 F. 2d 936 (1967) that "those convictions which are for the same crime should be admitted sparingly . . . and then only when

^{2/} This Court in the Luck case cited some of the factors that might be relevant in this balancing process, including "the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction." 121 U.S. App. D.C. at 157, 348 F. 2d at 769.

B the circumstances indicate strong reasons for disclosure. . . ."
383 F. 2d at 940. Clearly, in failing to apply the general
Luck standards for determining whether "the prejudicial effect
of impeachment far outweighs the probative relevance of prior
conviction," the trial court also failed to apply the more
stringent standards set forth in the Gordon case for permitting
the use of prior convictions for the same or substantially the
same conduct.

The transcript of the record below makes clear that the
trial judge failed to weigh the prejudicial effect of the prior
convictions and failed to give "strong reasons for disclosure"
because of his own feelings concerning appellant's "fantastic
story" (Tr. 55). The Court below thus fell into the very error
recently warned against by this Court in determining the Luck
issue by failing to "insulate [his] discretion from the influ-
ence of his own impressions as to the accused's credibility."
Williams v. United States, ___ U.S. App. D.C. ___, ___ F. 2d ___
(No. 20,583, decided April 5, 1968) (concurring opinion, Slip Op.
at 14).

In two recent cases in which this Court reluctantly upheld
a trial judge's exercise of discretion under Luck in permitting
impeachment by use of prior convictions for the same or substan-
tially the same conduct, Payne v. United States, ___ U.S. App.
D.C. ___, 392 F. 2d 820 (1968); Williams v. United States, supra,
it was noted that "[t]he actions of counsel and the judge might

well have been different if this were tried after Gordon v. United States." 392 F. 2d at 821.

This is such a case. Although it was tried after Gordon and, indeed, the trial judge purported to rely on Gordon, he failed to apply the stringent standards set forth therein for permitting use of prior convictions for the same conduct, and, hence, clear reversible error was committed.

II. SECTION 14-305, D.C. CODE, AS INTERPRETED BY THIS COURT, IMPAIRS THE EXERCISE OF A CRIMINAL DEFENDANT'S SIXTH AMENDMENT RIGHT TO TESTIFY IN HIS OWN BEHALF.

[With respect to Point II, appellant desires the Court to read the following pages of the transcript: 46-58, 84-85.]

Section 14-305, D.C. Code, was passed originally in 1901 to abolish the common law rule that a convicted criminal was incompetent to give evidence in any case, civil or criminal. Although the incompetency to testify was removed, the statute contained a proviso that the witness' prior conviction of a crime "may be given in evidence to affect his credit as a witness." Impeachment by prior conviction was grounded "upon the theory that the depraved character of persons who commit crimes involving moral corruption makes them unworthy of trust in testifying." Clawans v. District of Columbia, 61 U.S. App. D.C. 298, 299, 62 F. 2d 383 (1932).

As this Court has noted, this proviso is a "remnant of a discarded rule," Stevens v. United States, 125 U.S. App. D.C. 239, 370 F. 2d 485, 487 (1966) (Fahy, J., dissenting), and like

other such "unsatisfactory remnants of an age gone by," ^{3/} should be declared unconstitutional if it fails to comply with present day fair trial standards. See Washington v. State of Texas, 388 U.S. 14 (1967).

This Court long has recognized the prejudicial effect upon a criminal defendant of permitting the prosecutor to question him concerning prior convictions since it "may result in casting such an atmosphere of aspersion and disrepute about the defendant as to convince the jury that he is an habitual lawbreaker who should be punished and confined for the general good of the community." Richards v. United States, 89 U.S. App. D.C. 354, 357, 192 F. 2d 602, 605 (1951). Until the Luck decision, however, the government was permitted as a matter of course to cross-examine a criminal defendant with respect to prior convictions for impeachment purposes.

In Luck and subsequent cases, this Court, recognizing the fundamental unfairness arising "when an evidentiary rule may deter a defendant from testifying in his own behalf or if he does testify subjects him to evidence highly prejudicial on the issue of guilt though inadmissible for that purpose," ^{4/} interpreted §305 to mean that the use of prior convictions for impeachment

^{3/} Ferguson v. State of Georgia, 365 U.S. 570, 602 (1961) (concurring opinion).

^{4/} Stevens v. United States, supra, at 486 (Fahy, J., dissenting).

purposes was not automatic but should be a matter of discretion for the trial judge.

The operation of a "sound judicial discretion" under §305, however, still permits a trial judge to admit evidence of past crimes, and thus still deters a defendant from testifying in his own behalf and subjects him to evidence highly prejudicial on the issue of guilt if he does testify. ^{6/} Such discretion does not and cannot cure the impingement upon a criminal defendant's Sixth Amendment right to offer testimony in his own behalf and his right to have his day in court free from the "extreme prejudice inherent" in the admission of such evidence. Turner v. State of Louisiana, 379 U.S. 466 (1965); Estes v. State of Texas, 381 U.S. 532 (1965).

^{5/} The Court in Luck pointed out that §305 was not written in mandatory terms and that the statute "leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case." 348 F. 2d at 768.

^{6/} A recently published study of jury behavior, H. Kalven and H. Zeisel, The American Jury, 160 (1966), statistically demonstrates that the use of prior conviction evidence for impeachment purposes adversely affects a defendant's chances for acquittal. Moreover, studies on jury behavior clearly indicate that both innocent and guilty defendants are coerced into remaining silent because they fear introduction of their criminal record. H. Borchard, Convicting the Innocent, 136-140, 232, 364-367 (1932); J. Frank, Not Guilty, 106-107 (1957); H. Kalven and H. Zeisel, The American Jury, 146 (1966).

^{7/} In Trimble v. United States, 125 U.S. App. D.C. 173, 369 F. 2d 950 (1966), this Court declined in its discretion to consider the argument that impeachment by prior conviction under §305 was a violation of due process. In addition to the fact that the constitutional attack in this appeal is based on a specific Sixth Amendment right rather than due process, here vigorous objection on the ground of prejudice was made below, whereas in Trimble no objection was made to the use of prior conviction evidence by defendant. Furthermore, since Trimble, developments in the Supreme

The basic protections afforded a criminal defendant under the Sixth Amendment have been clearly spelled out by the Supreme Court. The Court in In re Oliver, 333 U.S. 257, 273 (1948) observed that:

A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel. (Emphasis added.)

That a criminal defendant's Sixth Amendment right to offer testimony in his own behalf cannot be subject to any condition or made contingent upon the exercise of judicial discretion is clear from the case of Griffin v. State of California, 380 U.S. 609 (1965). There, the Supreme Court held that it was a violation of a criminal defendant's Fifth Amendment right not to testify, to permit comment, either by the trial court or by the prosecution, upon a defendant's failure to take the stand. ✓ As stated by the Court, "comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice' . . . which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S. at 613-614. //

2/ Continued

Court and in this Court, discussed infra, make even clearer the unconstitutionality of impeachment by prior conviction.

Just as a criminal defendant has a constitutional privilege not to testify without any prejudice or penalty attaching to the exercise of such privilege, so he has a constitutional privilege to give testimony in his own behalf without prejudice and without "making its assertion costly." The exercise of judicial discretion obviously could give no sanction to comment on the failure to testify and it cannot sanction such a deterrent upon a defendant's right to testify or justify the creation of "an atmosphere of aspersion and disrepute" about him if he does testify. ^{8/}

Obviously, not every constraint upon a defendant's right to testify can be removed from a criminal trial. The mere fact of taking the stand and being subjected to cross-examination provides some restraint and gives to the prosecution numerous alternatives for impeaching the credibility of a testifying defendant without resorting to evidence of prior crimes. As discussed in a recent Harvard Law Review Note cited by this Court in Pinkney v. United States, 124 U.S. App. D.C. 209, 363 F. 2d 696, 698 (1966):

^{8/} The basic constitutional infirmity of the Luck decision and subsequent cases is illustrated by the recent case of Evans v. United States, ___ U.S. App. D.C. ___, ___ F. 2d ___ (No. 20,480, May 8, 1968). There, this Court stated that the "real issue" under Luck is "whether Appellant met the burden of showing a special need for the jury to hear his version of the events." (Slip Op. at 7). There can be no requirement for such a showing consistent with a defendant's Sixth Amendment right to testify in his own behalf.

. . . juries are unlikely to place much faith in a defendant's testimony, both because they are aware of the pressure on him to tell an exculpatory story and because they know he has had time to prepare the best story possible. The defendant's demeanor on the stand is itself supposed to be a moderately reliable indicator of his honesty, and the prosecutor has other methods with which to discredit the defendant's testimony than the use of character evidence. Through cross-examination as to the facts he should be able to raise doubts not merely about defendant's general truthfulness, but more importantly, about the credibility of the story the defendant has told in the particular case. He is also permitted to challenge the defendant's memory and capacity for observation, and he can prove prior statements inconsistent with those made at trial. 78 Harv. L. Rev. 426, 440 (1964).

The difference between these methods of cross-examination and impeachment by prior conviction is that the former relate to the facts of the case at hand, the defendant's demeanor, etc., while the latter introduces extraneous matters calculated primarily to prejudice a defendant on the issue of guilt.^{9/} It is no justification for the use of prior convictions that a defendant may be discredited by other means, that there are other built-in constraining factors upon his testifying in his own behalf, or that the court allegedly can minimize the prejudicial effects of the use of prior convictions by limiting instructions.

9/ "Prosecutors count on this reaction from jurors, and many defense attorneys apparently prefer no instructions at all on the use of the evidence, believing that instructions can only aggravate the effect of the evidence on the jury." 78 Harv. L. Rev., supra, at 441.

In this connection, the argument was made in the Griffin case that "the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and . . . comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege." 380 U.S. at 614. The Supreme Court, in response, stated that "[w]hat the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." 380 U.S. at 614.

In short, the time has come for this Court to enforce judicially what has long been recognized, namely, that the very introduction of evidence of prior convictions prejudices a defendant since juries cannot be expected to limit such evidence to the alleged purpose of gauging a defendant's credibility. ^{10/}

As stated by this Court in Pinkney v. United States, 124 U.S. App. D.C. 209, 363 F. 2d 696, 698, note 5:

"Recent jury studies" indicate that juries "failed to segregate evidence of a prior record introduced for impeachment purposes and used it instead as an indication that the defendant 'was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial.'" Note, Procedural Protections of the

^{10/} As noted by Mr. Justice Jackson in his concurring opinion in Krulwitch v. United States, 336 U.S. 440, 453 (1949):

The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.

. . .

Criminal Defendant - A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime,
78 Harv. L. Rev. 426, 441 (1964). (Footnote omitted.)

✓ This Court should abandon "the assumption that juries can compartmentalize their minds and hear things for one purpose and not for another," and follow the lead of the Supreme Court "by going behind the historic assumptions of the law of evidence and considering the psychological reality of the jury's functioning . . ." Awkard v. United States, 122 U.S. App. D.C. 165, 352 F. 2d 641, 646 (1965). ^{11/}

The abandonment of the archaic assumptions of the law of evidence can be traced by developments since Michelson v. United States, 335 U.S. 469 (1948). In Michelson, the Court upheld the practice of permitting the prosecution to cross-examine a criminal defendant's character witness with respect to prior crimes committed by the defendant. The Court reasoned that since a defendant had the option of not putting on character witnesses and thus avoiding "this whole confounding line of inquiry," it was not unfair to allow the prosecution to meet by cross-examination an issue voluntarily tendered by the defense. 335 U.S. at 485.

11/ Significantly, legislative abandonment of impeachment by prior conviction has begun. A list, not purporting to be exhaustive, includes Kansas (Kan. Stat. Ann. §60:421 (1964)), Pennsylvania (19 Pa. Stat. Ann. §711 (1964)), and the Virgin Islands (V.I. Code, Title 5, §835 (1964)). Both the Uniform Rules of Evidence and the Model Code of Evidence have recommended abolishing the practice. Uniform Rule 21; Model Code, Rule 106(3).

Secondly, the Court somewhat hesitantly relied upon the use of limiting instructions in this regard. While recognizing that "the jury almost surely cannot comprehend the Judge's limiting instructions," the Court concluded that "limiting instructions on this subject are no more difficult to comprehend or apply than those upon various other subjects," and cited as an example instructions that admissions of a codefendant are to be limited to the question of his guilt and are not to be considered as evidence against other defendants. 335 U.S. at 484-485.

In conclusion, the Court in Michelson stated:

We concur in the general opinion of courts, text-writers and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter-privilege to the other . . . To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice. 335 U.S. at 486.

Since Michelson, however, the Supreme Court, in case after case, has held that this "grotesque structure" cannot stand in light of constitutional requirements. In Ferguson v. State of Georgia, supra, the Court struck down a Georgia statute which permitted a criminal defendant only the right to make a statement, unsworn and unelicited by counsel, as inconsistent with the Sixth Amendment. In Jackson v. Denno, 378 U.S. 368 (1964), the Court held unconstitutional the New York procedure of permitting the jury to assess the voluntariness of confessions on the

ground that limiting instructions could not ensure that the jury would separate the issue of voluntariness from that of guilt or innocence. Further, the Court ruled that determination of the voluntariness of a confession is "one that requires facing the issue squarely, in illuminating isolation and unbecclouded by other issues and the effect of extraneous but prejudicial evidence." 378 U.S. at 390.

The recent case of Washington v. State of Texas, 388 U.S. 14 (1967), overturned, as violative of the Sixth Amendment, a Texas statute which provided that persons charged as principals, accomplices, or accessories in the same crime could not be introduced as witnesses for each other.

Finally, in a case decided this term, Bruton v. United States, 36 U.S.L.W. 4447 (U.S. May 20, 1968), the Court came full circle and declared unconstitutional the practice relied upon in Michelson of permitting admissions of a codefendant with instructions that a codefendant's confession inculcating the defendant had to be disregarded in determining the latter's guilt or innocence.

We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of [codefendant's] confession in this joint trial violated petitioner's right of cross-examination secured

by the Confrontation Clause of the Sixth Amendment. 36 U.S.L.W. at 4448. 12/

The recent case of Spencer v. State of Texas, 385 U.S. 554 (1967) is not to the contrary, for it is distinguishable on many grounds and clearly points up the unconstitutionality of the practice involved in the present case. In upholding the procedures employed by the State of Texas in enforcing its

12/ In striking down these outmoded and inherently prejudicial evidentiary practices, the Court has not been concerned with the severity of the prejudicial effects in the particular case at hand. As stated in Bruton:

We, of course, acknowledge the impossibility of determining whether in fact the jury did or did not ignore [codefendant's] statement inculpatory petitioner in determining petitioner's guilt. But that was also true in the analogous situation in Jackson v. Denno, and was not regarded as militating against striking down the New York procedure there involved. It was enough that that procedure posed 'substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined. These hazards we cannot ignore.' 36 U.S.L.W. at 4451.

The prejudicial effect on appellant herein also meets the standard adopted by the Supreme Court in cases applying the Fourteenth Amendment to state procedures requiring "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. State of California, 386 U.S. 18, 24 (1967). Here, as in Chapman, "[a]n error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless." 386 U.S. at 23-24. Cf. Gillison v. United States, ___ U.S. App. D.C. ___, ___ F. 2d ___ (No. 21,248, decided July 2, 1968).

habitual-criminal statute, where the prosecution was permitted to introduce proof respecting a defendant's prior convictions on the issue of punishment, the Court, in a five-to-four decision, concluded that it would be beyond its proper function in a federal system to encroach upon the constitutional power of states to promulgate their own rules of evidence to try their own state-created crimes in their own state courts.

Secondly, the Court was unable to find that the general "fairness" standards of the Fourteenth Amendment were infringed simply because the type of evidence involved "may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects," citing as an example joint trials of codefendants and the inherent opportunities for unfairness involved therein, the very practices subsequently found to violate the Sixth Amendment in federal criminal trials in the Bruton case. 385 U.S. at 562.

Significantly, the Court in Spencer distinguished Jackson v. Denno on the ground that the emphasis there was on protection of a "specific constitutional right," namely, to ensure that an involuntary confession was not relied upon by the jury, in contrast to the general "fairness" approach relied upon by appellants in Spencer. Since it is clear that in the present case, as in Jackson v. Denno and Bruton, a "specific constitutional right," a criminal defendant's Sixth Amendment right to testify in his own behalf, is at stake, the Court's reasoning in Spencer only emphasizes the unconstitutionality of permitting impeachment

by prior conviction pursuant to §305. ✓ Accordingly, the extent to which the subsequent Bruton decision weakens the authority of Spencer v. Texas, particularly in federal criminal cases, need not be considered. //

Finally, the difficulties experienced by this Court, the lower courts and the bar in applying the discretionary standards read into §305 by the Luck decision point up the inherent infirmity and unworkability of the practice. In the seventeen cases reaching this Court since Luck in which the issue of impeachment by prior conviction has been raised, three have been reversed on the ground of abuse of discretion, eight cases have held that the Luck issue was not properly invoked by the defendant, twice this Court has declined to reverse but indicated that the result might well have been different if the case had been tried after the Gordon decision, and four times, while finding no abuse of discretion, this Court has criticized the trial court's handling of the Luck issue. (See Appendix for summary of Luck decisions.)

A further indication of the difficulty of enunciating proper standards for the exercise of judicial discretion under §305 is indicated by the Gordon, supra, and Williams, supra, decisions. In Gordon, this Court suggested that it would be appropriate for the district judge to have the accused take the stand in a non-jury hearing before resolving the Luck issue. Six months later in Williams, Judge Bazelon in a concurring opinion, indicated that the Luck issue should be resolved before

a defendant testifies for "such a rule would insulate the trial judge's discretion from the influence of his own impressions as to the accused's credibility." (Slip Op. at 14). The failure to so "insulate" himself was, of course, the basis of the trial judge's error in the present case. // ?

Thus, the attempt to formulate standards and procedures for the exercise of a "sound judicial discretion" under Luck has demonstrated only that it cannot be done. The crux of the matter is that a criminal defendant's forgoing of his Sixth Amendment right to testify in his own behalf because of fear of prejudice from prior convictions can never be justified by the exercise of judicial discretion, and the prejudicial effect of impeachment by prior conviction can never be removed by the exercise of such discretion. A criminal defendant's Sixth Amendment rights can be protected only by prohibiting the use of prior convictions for impeachment purposes, and §305 of D.C. Code, Title 14, should be declared unconstitutional to the extent that it permits such use.

CONCLUSION

For the reasons set forth above, appellant's conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,

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August 8, 1968

APPENDIX

Summary of Luck Decisions

Smith v. United States, 123 U.S. App. D.C. 259, 359 F. 2d 243 (1966) (Trial prior to Luck and trial court's discretion not invoked; trial court admonished to let jury hear defendant's story "unaccompanied by a recital of his past misdeeds."). Walker v. United States, 124 U.S. App. D.C. 194, 363 F. 2d 681 (1966) (Luck issue not raised by defendant). Pinkney v. United States, 124 U.S. App. D.C. 209, 363 F. 2d 696 (1966) (Error to allow impeachment by prior conviction where petty offenses involved). Hood v. United States, 125 U.S. App. D.C. 16, 365 F. 2d 949 (1966) (Trial judge's discretion under Luck not properly invoked by defendant). Trimble v. United States, 125 U.S. App. D.C. 173, 369 F. 2d 950 (1966) (Luck objection not made by defendant, and, in any event, trial judge on his own properly exercised Luck discretion). Brown v. United States, 125 U.S. App. D.C. 220, 370 F. 2d 242 (1966) (Reversed for improper exercise of Luck discretion; "Too often the defendant is kept from the stand or, having risked impeachment, is clearly prejudiced by admission of his prior record."). Stevens v. United States, 125 U.S. App. D.C. 239, 370 F. 2d 485 (1966) (Affirmed per curiam; Fahy, J., dissenting on grounds of Luck even though not raised below). Harley v. United States, ___ U.S. App. D.C. ___, 377 F. 2d 172 (1967) (Trial judge's discretion under Luck not properly

invoked by defendant). Carter v. United States, ____ U.S. App. D.C. ____, 379 F. 2d 147 (1967) (Tried before Luck, and record as a whole does not justify reversal). Lewis v. United States, ____ U.S. App. D.C. ____, 381 F. 2d 894 (1967) (Luck issue not raised at trial; ". . . in the fair administration of justice some obligation is imposed by Luck upon the trial court and the prosecution, and the time may come when we shall not feel bound to ignore its principles merely because the defense does so."). Gordon v. United States, 127 U.S. App. D.C. 343, 383 F. 2d 936 (1967) (Luck issue not properly raised below; adopted more stringent standards for convictions for similar conduct; recommended having accused take stand out of presence of jury before determining Luck issue). Brooke v. United States, ____ U.S. App. D.C. ____, 385 F. 2d 279 (1967) (No abuse of Luck discretion; defendant would have told same story as defense witness). Laughlin v. United States, ____ U.S. App. D.C. ____, 385 F. 2d 287 (1967) (No abuse of Luck discretion).

Payne v. United States, ____ U.S. App. D.C. ____, 392 F. 2d 820 (1968); (Result may well have been different if tried after Gordon, but not reversible in a trial prior to Gordon).

Barber v. United States, ____ U.S. App. D.C. ____, 392 F. 2d 517 (1968) (Reversed because trial court failed to invoke Luck criteria; ". . . our experience has taught us that when inflammatory irrelevancies are allowed to come to the attention of the jury, the quest for truth aborts, and criminal injustice often

results."). Williams v. United States, ___ U.S. App. D.C. ___, ___ F. 2d ___ (No. 20,583, decided April 5, 1968) (No abuse of Luck discretion, but instructed trial court to set forth considerations more fully on the record; result might well have been different if tried after Gordon; concurring opinion indicates Luck issue better determined before defendant testifies so that trial judge can "insulate" himself). Evans v. United States, ___ U.S. App. D.C. ___, ___ F. 2d ___ (No. 20,480, decided May 8, 1968) (No abuse of Luck discretion since defendant didn't show a "special need for the jury to hear his version of the events"; treatment of Luck issue could well have been more comprehensive, and "must not be, as here, partly off the record as by informal conference in chambers"; Bazelon, J., dissenting on ground of abuse of Luck discretion).

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Brief for Appellant on appellee by delivering a copy thereof, this 8th day of August, 1968, to David G. Bress, Esquire, United States Attorney in and for the District of Columbia, United States Court House, Washington, D. C.



Hugh Latimer